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No. 93-723

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,

v.

X-CITEMENT VIDEO, INC., and RUBIN GOTTESMAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF PHE, INC. IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. A SCIENTER REQUIREMENT AS TO MINORITY MUST BE CLEARLY AND PRECISELY ARTICULATED	5
II. THE SCIENTER REQUIREMENT SHOULD BE "KNOWLEDGE" OR "WILLFUL BLINDNESS"	6
III. A "RECKLESSNESS" STANDARD WOULD NOT SIGNIFICANTLY ADVANCE THE GOVERNMENTAL INTEREST OF STOPPING CHILD PORNOGRAPHY	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases — Page

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 6, 11
Gooding v. Wilson, 405 U.S. 518 (1972) 6, 11
Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960) 5
Jacobson v. United States, 112 S. Ct. 1535 (1992) .. 12
Liparota v. United States, 471 U.S. 419 (1985) 5, 12
Mishkin v. New York, 383 U.S. 502 (1966) 9
Morissette v. United States, 342 U.S. 246 (1952) 4, 5
New York v. Ferber, 458 U.S. 747 (1982) ..... *passim*
Osborne v. Ohio, 495 U.S. 103 (1990) 9, 10, 12
PHE, Inc. v. U.S. Dep't of Justice, 743 F. Supp. 15 (D.D.C. 1990) 8
PHE, Inc. v. U.S. Dep't of Justice, No. 90-0693 (D.D.C. Sept. 30, 1993) 8
Smith v. California, 361 U.S. 215 (1959) ..... *passim*
Speiser v. Randall, 357 U.S. 513 (1958) 6, 11
State v. Young and Osborne, 525 N.E.2d 1363 (Ohio 1988) 10
United States v. Feola, 420 U.S. 671 (1975) 5
United States v. PHE, Inc., 965 F.2d 848 (10th Cir. 1992) 7
United States v. United States Gypsum Co., 438 U.S. 422 (1978) 5
United States v. X-Citement Video, Inc., 982 F.2d 1285 (9th Cir. 1992) 7

Statute

18 U.S.C. § 2252 ..... *passim*

Miscellaneous

Final Report, Attorney General's Commission on Pornography (1986) 12
Petition for Rehearing with Suggestion for Rehearing En Banc, *United States v. X-Citement Video, Inc.* (9th Cir. 1992) (Nos. 89-50556 & 89-50562) 4

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BRIEF *AMICUS CURIAE* OF PHE, INC. IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS

PHE, Inc. is a North Carolina corporation engaged in the business of mailing to adult customers across the country contraceptives and various expressive materials protected by the First Amendment, including sexually explicit magazines and videotapes, and a medical newsletter edited by a physician entitled *Sex Over Forty*.[1] PHE's sexually explicit speech is sent only to adults, and only upon request.

PHE takes great care to assure compliance with state and federal obscenity laws. PHE conducts rigorous re-

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters memorializing their consent have been filed with the Clerk of the Court.

view procedures that include review of all sexually explicit materials by independent psychologists and sociologists to ensure that no materials sold by PHE violate the obscenity standards of any community in which they are sold. PHE's independent reviewers reject any material that might violate any one of the three prongs of the *Miller v. California* test for obscenity, even though the material must violate all three prongs to be found obscene. PHE has also met with law enforcement officials, sought their advice to ensure that no obscene materials are distributed by PHE, and strictly abided by the advice it has received. Nevertheless, PHE has twice been charged, but never convicted, with violation of obscenity laws.

PHE operates its business in an entirely open and above-board manner. PHE is a member of the local Chamber of Commerce, the Better Business Bureau, the Direct Marketing Association, and numerous other business and civic groups. PHE is a significant employer in its community, and offers its employees the same array of benefits as other leading businesses. PHE's business is vastly different from the clandestine, one-to-one world of child pornography.

PHE strongly opposes child pornography, and supports efforts to eradicate it. Nevertheless, PHE is concerned—based in part on experience, *see infra* at note 6—that prosecutors in their zeal to enforce obscenity and child pornography laws will target constitutionally protected expression and chill its distribution. Thus, PHE submits this brief *amicus curiae* to encourage the Court—if it decides to read a scienter element into 18 U.S.C. § 2252—to articulate a precise and substantial scienter requirement for prosecutions under § 2252.

SUMMARY OF ARGUMENT

The parties agree that in a child pornography prosecution scienter as to the minority of a participant is constitutionally required. The parties diverge on whether 18 U.S.C. § 2252 contains such a requirement, and if not, whether the Court should read the necessary scienter element into the statute. This brief is limited to the question of what degree of scienter is constitutionally required should the Court reach that question.

The jurisprudence of this Court requires that any exceptions to the protections of the First Amendment be "finely drawn" with "narrow specificity." If the Court reads a scienter element into the statute, it should articulate a clear and precise standard. Point I. To reduce the risk of an undue chilling effect caused by a low or vague scienter requirement, the Court should plainly state that evidence of "actual knowledge" or "willful blindness" is required in any prosecution under § 2252. A "recklessness" standard, as suggested by Judge Kozinski below, would unduly chill the distribution of protected expression. Point II. Finally, because of the clandestine and one-to-one nature of the sale and trade of child pornography, a "recklessness" standard would not diminish the government's legitimate enforcement efforts against it. A "recklessness" standard would only be relevant at the line between legitimate and illegitimate speech, which is exactly the point where a vague and uncertain standard like "recklessness" is most inappropriate. "Actual knowledge" and "willful blindness" are far more precise and constitutionally appropriate standards for scienter. Point III.

ARGUMENT

Amicus takes no position on the first two of the three questions presented by this case—whether 18 U.S.C. § 2252 lacks a scienter requirement as to the minority of a participant and, if so, whether the Court can and should read such a scienter requirement into the statute. *Amicus* addresses this brief only to the third question: If the Court reads a scienter requirement into the statute, what standard of scienter should apply? *Amicus* argues that to avoid unduly chilling the distribution of constitutionally protected expression, a clear and precise scienter element should be required for any prosecution under § 2252.

As a threshold matter, the parties agree that in child pornography prosecutions the Constitution requires *some* element of scienter as to the minority of a participant. There is no dispute that in such prosecutions the Constitution requires the government to establish scienter as to minority.[2] The Court's First Amendment cases generally require that scienter elements be clear and precise, *see* Points I and II. In the context of § 2252, those same cases require at least some scienter as to minority. Moreover, even apart from First Amendment requirements, the Court's general jurisprudence on scienter requires that the government establish scienter as to minority.[3] The issue

[2] The government implicitly acknowledged this conclusion in its petition for certiorari by arguing that the Court should read a scienter requirement into the statute "to avoid holding it unconstitutional." Petition for Certiorari at 7. In the court below, the government more expressly acknowledged that constitutional problems would arise absent a scienter requirement. *See* Petition for Rehearing with Suggestion for Rehearing En Banc, *United States v. X-Citement Video, Inc.*, at 6-12 (9th Cir. 1992) (Nos. 89-50556 & 89-50562).

[3] Under 18 U.S.C. § 2252, there is a single fact that separates entirely lawful conduct—distributing non-obscene visual depictions of individuals engaged in sexually explicit conduct—from potentially unlawful conduct—distributing non-obscene visual depictions of *a minor* engaged in sexually explicit conduct. As in *Morissette v. United States*, 342 U.S. 246 (1952), a defendant must have some knowledge of the single critical fact that makes his or her conduct a crime. *See id.* at 270-71. Section 2252 presents just the situation envisioned in *United States v. Feola*, 420 U.S. 671 (1975), "where legitimate conduct becomes unlawful solely because of the identity of the individual . . . affected." *Id.* at 685. In *Feola*, the accused knew "from the very outset that his planned course of conduct [was] unlawful," and thus his alleged ignorance as to one element was not problematic. *Id.* In contrast, absent scienter as to the minority of a participant, a distributor of non-obscene sexually explicit material has no reason to know that his or her conduct may be unlawful.

Moreover, § 2252 cannot be placed in the narrow category of strict liability offenses, for two reasons. First, Congress gave no clear indication of its intent to create such a strict liability offense, as is necessary "to justify dispensing with an intent requirement." *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978); *see also Liparota v. United States*, 471 U.S. 419, 426 (1985). Indeed, the legislative history plainly refutes such a conclusion. *See* Petition for Certiorari at 8-9. Second, § 2252 does not comport with the limitations regarding penalty and stigma normally required of strict liability offenses. *See Morissette*, 342 U.S. at 255-56; *see also Holdridge v. United States*, 282 F.2d 302, 310 (8th Cir. 1960) (authored by then Judge Blackmun).

is not whether scienter as to minority is required, but how strong and precise the scienter requirement must be.

I. A SCIENTER REQUIREMENT AS TO MINORITY MUST BE CLEARLY AND PRECISELY ARTICULATED.

If the Court decides to read scienter as to minority into § 2252, the Court should establish a precise standard.

Under the Court's First Amendment jurisprudence, Congress may criminalize the distribution of expressive material if it contains child pornography. *See New York v. Ferber*, 458 U.S. 747, 764 (1982). The Court has made clear, however, that in the "sensitive area" of speech that is "unprotected" by the First Amendment, "the conduct to be prohibited must be adequately defined." *Id.* To be prohibited, expression must fall into one of a handful of "well-defined and narrowly limited

classes of speech." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). The "separation of legitimate from illegitimate speech" calls for "sensitive tools," and the line must be "finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

To be constitutional, a statute must "define the standard of responsibility with requisite narrow specificity." *Gooding v. Wilson*, 405 U.S. 518, 527 (1972). As the Court explained in *Gooding*—a "fighting words" case—a statute with an imprecise standard would be " 'easily susceptible to improper application.' " *Id.* at 528 (citation omitted). The Court's concern for specificity arises because "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Id.* at 521.

II. THE SCIENTER REQUIREMENT SHOULD BE "KNOWLEDGE" OR "WILLFUL BLINDNESS."

In defining a scienter requirement for § 2252, the Court should articulate a clear and unambiguous standard in order to avoid the chilling effect against which the scienter requirement guards. The Court in *Ferber* warned that "[l]ike obscenity statutes, laws directed at child pornography run the risk of suppressing protected expression by allowing the hand of the censor to be unduly heavy." *Ferber*, 458 U.S. at 756.

To avoid the risk of an unduly heavy governmental hand, the Court should make clear that a defendant must either have had "actual knowledge" of the minority of a participant, or must have been "willfully blind" to evidence that a participant was a minor.[4] Any lesser standard—including the "recklessness" standard suggested by

[4] The government appears to accept and embrace a standard of "actual knowledge" and "willful blindness." *See* Petition for Certiorari at 10-11 & n.4. As discussed below, however, the government incorrectly equates "recklessness" with "knowledge" and "willful blindness." *Id.* at 11 n.4.

Judge Kozinski below[5]—risks the undue chilling effect that *Ferber* and *Smith v. California*, 361 U.S. 215 (1959), seek to prevent.

In *Smith*, the Court struck down a low scienter requirement in order to reduce the chill and self-censorship the threat of criminal prosecution would otherwise cause. *Smith*, 361 U.S. at 152-54. Without an appropriate scienter element,

> "[e]very bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience." And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation on the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.

Id. at 153-54 (citation and footnote omitted). With only a recklessness standard read into § 2252, a distributor of expressive materials would be faced with two choices: Undertake the same inventory review found to be "altogether unreasonable" in *Smith*, or risk criminal liability subject to the interpretation of "recklessness" by a potentially overzealous prosecutor[6] and jury. Because the dis-

[5] *See United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1293 (9th Cir. 1992) (Kozinski, J., dissenting in part); Pet. App. 18a.

[6] *Amicus* PHE has itself been the direct victim of overzealous prosecutors spurred to action by private pro-censorship groups. *See United States v. PHE, Inc.*, 965 F.2d 848, 855, 860 (10th Cir. 1992) (finding indictment to be "tainted fruit of a prosecutorial attempt

tribution of sexually oriented material is highly controversial, and the stigma of even an allegation of distributing child pornography is so great, the distributor "will tend to restrict the books he sells to those he has inspected," with the result that "the State will have imposed a restriction upon the distribution of constitutionally protected . . . literature." *Smith*, 361 U.S. at 153.[7]

The risk of self-censorship of constitutionally protected material is especially great with subject matter involving sexuality and younger persons. As the Court has expressly acknowledged, there are concrete situations in which youthful-looking—but still adult—actors might be used in protected expression. This Court wrote in *Ferber* that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." *Ferber*, 458 U.S. at 763. The Court noted that this situation was "not merely a hypothetical possibility." *Id.* at 763 n.16 (citing news articles concerning a 24-year old playing the part of "Lolita," and other such substitutions in popular movies). Yet with a recklessness standard and the accompanying uncertainty about how such a standard would be applied, many dis-

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to curtail PHE's future First Amendment protected speech"); *PHE, Inc. v. U.S. Dep't of Justice*, 743 F. Supp. 15 (D.D.C. 1990) (granting preliminary injunction against bad faith pattern of prosecutions designed to suppress protected expression); *PHE, Inc. v. U.S. Dep't of Justice*, No. 90-0693, slip op. at 6, 11-12 & n.4 (D.D.C. Sept. 30, 1993) (describing role of private pro-censorship groups in encouraging prosecutions).

[7] Other than the issue of a woman's right to an abortion, no issue receives more attention—and opposition—from activist political groups than the distribution of sexually oriented material. Unlike the abortion issue, however, there are no strong groups or coalitions exerting countervailing political pressure in favor of the distribution of sexually oriented material. Thus, there is a realistic concern that prosecutions directed at sexually oriented material may be motivated by political considerations rather than by legitimate law enforcement objectives. *See supra* note 6.

tributors would refrain from distributing this type of constitutionally protected material. Simply put, although a distributor might have *no* knowledge that any performer was underage, a prosecutor could argue, and a jury could conclude, that merely having a "young looking" performer was sufficiently "reckless." Without a "knowledge" (or "willful blindness") standard, distributors would censor themselves and decline to distribute constitutionally protected materials.[8] To avoid chilling legitimate expression, the Court should make clear that "knowledge" or "willful blindness" is the scienter the government must establish to obtain a conviction under § 2252.

The Court's decision in *Osborne v. Ohio*, 495 U.S. 103 (1990), does not require a contrary conclusion. A superficial reading of that decision suggests that the Court approved a recklessness standard, writing that it "plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter." *Id.* at 115. That statement, however, does not address—much less resolve—the question presented here. *Ferber* indicated, without explication, only that "some" element of scienter was required, and the statute in *Osborne* plainly had "some" element of scienter. Neither *Ferber* nor *Osborne* addressed *the degree* of scienter that is constitutionally required. In *Osborne*, neither party (and no *amici*) addressed or argued in their briefs what degree of scienter is constitutionally required. Osborne's arguments about scienter went not to the degree of scienter, but to whether the Ohio Supreme Court could

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[8] In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court wrote:

> The Constitution requires proof of scienter to avoid the hazard of self-censorshop of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.

Id. at 511. In the child pornography context, "ambiguity" is inherent in evaluating—guessing—whether a given performer looks too young. Because of that uncertainty, the Court should articulate a strong scienter requirement.

constitutionally read a scienter requirement into the statute and retroactively apply it to Osborne. *Id.* at 115-16. For a question as important as the degree of scienter required in criminal prosecutions that implicate presumptively protected expression, the Court should not rely on a passing comment made without analysis or benefit of briefing by the parties.

Moreover, even if the Court were to accept as constitutionally sufficient the scienter requirement in the *Osborne* case, the Ohio Supreme Court in the decision on review in *Osborne* defined "recklessness" to require a showing of *knowledge as to the minority* of a performer. In *State v. Young and Osborne*, 525 N.E.2d 1363 (Ohio 1988), the court squarely held that "only those who are on notice as to the illicit character of the material are subject to criminal penalties." *Id.* at 1369. Because the only thing that makes non-obscene "child pornography"[9] illicit is the minority of a performer, the statute in *Osborne* required that one be "on notice" as to minority in order to be subject to criminal penalties. Ohio's use of the "recklessness" label is simply misleading.[10]

Although the government adopts a "knowledge" standard in its petition for certiorari, it also asserts that "it is not likely to make a difference in many cases whether the Court adopts a 'knowledge' standard or a 'recklessness' standard." Petition for Certiorari at 11 n.4. As the *Osborne* case makes clear, however, the concept of recklessness is vague and open to quite varying interpretations. In the context of expressive material, vague standards such as recklessness hardly qualify as "sensitive tools," *Speiser*, 357 U.S. at 525, that impose the "requisite narrow specificity," *Gooding*, 405 U.S. at 527.

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[9] There was no suggestion that the photographs in *Osborne*, which did not contain sexual conduct beyond exhibition of the genitals, met the legal defintion of obscenity.

[10] Similarly, the statute at issue in *Ferber* contained a "knowledge" requirement. *See New York v. Ferber*, 458 U.S. 747, 751 (1982).

On a practical level, as discussed in the following Point, the government may be correct that the knowledge/recklessness distinction is "not likely to make a difference in many cases," but that fact strengthens rather than weakens the objections to a recklessness standard. Because almost all distribution of child pornography in this country is done clandestinely with *full* knowledge of the minority of the participants, convictions of child pornographers would be obtained under either standard. Thus, the *only* situation in which the knowledge/recklessness distinction would "make a difference" is with a distributor of sexually oriented material who *lacks* knowledge as to the minority of the performer (and who in fact thought the performer to be an adult). In such a case, a prosecutor and jury may nevertheless conclude that the distributor was "reckless." In other words, the knowledge/recklessness distinction will *only* "make a difference" at the line between legitimate and illegitimate speech. *Speiser* requires that this line be "finely drawn," *Speiser*, 357 U.S. at 525, but a "recklessness" standard is surely not a "finely drawn" standard.

To avoid a vagueness challenge and to provide the guidance required by *Chaplinsky*, *Speiser*, *Gooding*, *Smith*, and other cases, the Court should require that knowledge as to minority be demonstrated in a child pornography prosecution. Any lesser standard would lead to undue self-censorship and thereby "tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly." *Smith*, 361 U.S. at 154.

III. A "RECKLESSNESS" STANDARD WOULD NOT SIGNIFICANTLY ADVANCE THE GOVERNMENTAL INTEREST OF STOPPING CHILD PORNOGRAPHY.

As the Court was informed in *Osborne*, "since the time of [the] decision in *Ferber*, much of the child pornography market has been driven underground." *Osborne*, 495 U.S. at 110. Indeed, essentially the *entire* child pornography market has been driven underground. *See* Final Report, Attorney General's Commission on Pornography, at 406 (1986) ("Meese Commission") (child pornography is a "cottage industry" that is "largely distinct from any aspect of the industry of producing and making available sexually explicit materials involving only adults"). As described in *Osborne* and extensively illustrated in *Jacobson v. United States*, 112 S. Ct. 1535, 1537-40 (1992), the sale or exchange of child pornography in this country is accomplished by individual contacts and correspondence with full knowledge of the content of the materials being exchanged, including the minority of the participants. With that type of transaction, the government can establish knowledge either with direct evidence or "by reference to facts and circumstances surrounding the case [showing] that [a defendant] knew that his conduct was unauthorized or illegal." *Liparota v. United States*, 471 U.S. 419, 434 (1985). *See also Smith*, 361 U.S. at 154 (actual knowledge can be established with circumstantial evidence).[11] A "recklessness" standard would not significantly further the legitimate governmental interest in stopping the distribution of child pornography.

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[11] The Court in *Liparota* specifically gave as an example of such a "fact and circumstance" that the defendant "conducted part of the transaction in a back room." *Id.* at 434 n.17. With child pornography, essentially all transactions are conducted "in a back room."

CONCLUSION

If the Court reaches the question of what degree of scienter is required under § 2252, it should make clear that "actual knowledge" or "willful blindness" as to minority is constitutionally required.

Respectfully submitted,

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